Message

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Sent: 6/18/2019 6:17:15 PM

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Subject: FW: Supreme Court Could Choose 'Chaos' or Order in Superfund Case

FYI

Best regards,

Andrew

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From: Henderson, Dedre

Sent: Tuesday, June 18, 2019 11:53 AM

To: Mutter, Andrew <mutter.andrew@epa.gov>

Subject: Supreme Court Could Choose 'Chaos' or Order in Superfund Case

News

Supreme Court Could Choose 'Chaos' or Order in Superfund Case

Posted June 18, 2019, 4:30 AM

- Justices will hear Montana Superfund case next term
- Ultimate decision could create new lawsuits or reinforce statute, attorneys say

The U.S. Supreme Court's choice to take on Atlantic Richfield's Montana Superfund case could stoke a "blaze of litigation" or reinforce order under the contamination cleanup statute, depending on what the court decides, attorneys said.

Atlantic Richfield Co. is responsible for executing the Environmental Protection Agency's cleanup plan at the Anaconda Smelter Superfund site in Deer Lodge Valley, Mont.

A group of landowners whose properties are part of the Superfund site sued the company in lower courts and proposed their own cleanup plan, saying the EPA's plan doesn't go far enough to address the contamination. Their plan would cost about \$50 million.

The Montana Supreme Court sided with the landowners, ruling that they can pursue common law claims for environmental restoration.

"The state court's holding throws remediation efforts at Anaconda and other massive sites into chaos," the company said in its petition to the Supreme Court.

The Supreme Court on June 10 granted the energy company's request to hear the case. The justices will hear arguments and are expected to announce a decision in the term that begins in October.

A Supreme Court decision siding with the landowners could open the door for individuals to choose their own remedies at Superfund sites around the U.S., despite existing cleanup plans or settlement agreements, attorneys at Crowell & Moring LLP wrote in a June 13 legal alert.

John Barkett, a partner at Shook, Hardy & Bacon LLP in Miami, Fla., who handles Superfund and waste cases, doubts the Supreme Court would side with the landowners in the Montana case. The court is more likely taking up the case to preserve the cleanup processes established by Superfund law, he said.

"You cannot have a regulatory system where the public effectively decides cleanups," he said. "Superfund's written to avoid that."

Historic Rulings

Past Supreme Court decisions on Superfund law have created "considerable confusion and have led to increased litigation and lack of predictability," Noah Perch-Ahern, a partner at Greenberg Glusker Fields Claman & Machtinger LLP in Los Angeles, said in an email. "However, if the decision is clear, it could provide guidance to all affected parties."

In 2009, the Supreme Court overturned an appeals court's ruling in Burington Northern & Santa Fe Railway Co. v. U.S. to hold that Shell Oil Co. wasn't liable under Superfund law for a spilled product—in that case, pesticides—where the company took steps to reduce the likelihood of spills by setting requirements for handlers. The court's decision helped define the liability of a party that arranges for disposal, as opposed to a party distributing a useful product.

In a 2007 case, U.S. v. Atlantic Research Corp., the Supreme Court held that potentially responsible parties that voluntarily clean up contaminated sites, and haven't been ordered to do so, can recover a portion of the costs from other potentially responsible parties.

An 'Unusual' Decision

The Supreme Court asked the federal government's solicitor general in October to weigh in on the case. The solicitor general suggested the court decline the company's petition because the timing wasn't right.

"My guess is that there were four justices who just felt like if, in fact, the Montana Supreme Court got it wrong, it didn't make sense to wait. You might as well just fix it now," Barkett said. Under court rules, it takes four justices to agree to hear a case.

The court's decision to grant review is "unusual," Perch-Ahern said in an email. Perch-Ahern's practice includes a wide variety of environmental issues.

The grant doesn't mean the court is inclined to affirm or reverse the Montana Supreme Court's ruling, but does show that some justices think additional guidance on Superfund law's intersection with common law claims would be appropriate, he said.

"Given the lack of precedent on the specific issue presented, it does appear that some of the justices sensed error in the state court ruling," Perch-Ahern said in an email.

Robert Percival, director of the environmental law program at the University of Maryland's law school, said the case doesn't have any substantial precedent or conflicts with any other Superfund decision.

"What's kind of unusual here is the special nature of the suit that Montana law allows," he said.

The state Supreme Court's decision "permits juries to second-guess EPA at Superfund sites across Montana and exposes ongoing remediations to interference and delay," Atlantic Richfield said in a 2018 brief.

The Montana site is on EPA Acting Administrator Andrew Wheeler's list of contaminated sites that need "immediate, intense action."

The 300-square-mile site is near the former Anaconda Copper Mining Co. ore processing facilities. Waste produced at the site contaminated soil, groundwater, and surface water with heavy metals.

BP Amoco, now known as BP Plc, acquired Atlantic Richfield in 2000.

The case is Atlantic Richfield Co. v. Christian, U.S., No. 17-1498, review granted 6/10/19. To contact the reporter on this story: Sylvia Carignan in Washington at scarignan@bloombergenvironment.com

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